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Court: DoI can't postpone in-place energy royalty rule

In the second ruling of its kind a federal judge August 30 held that federal agencies may not delay implementation of regulations that are already in effect without first following formal rule-making procedures.

In the instant case U.S. District Court Judge Elizabeth Laporte in Northern California ruled the Office of Natural Resources Revenue (ONRR) did not have authority to delay implementation of an Obama administration coal, oil and gas royalty valuation rule.

However, she did not reinstate the Obama rule because she said ONRR separately had followed administrative law procedures in formally cancelling it, effective September 6.

In a similar court action on July 30 the U.S. Circuit Court of Appeals for the District of Columbia rejected by a 9-to-2 vote an attempt by EPA to postpone implementation of a methane emissions rule.

The two decisions may set a precedent for Trump administration attempts to defer implementation of other public lands energy regulations. Specifically, the Interior Department on June 14 delayed the implementation of ten or so provisions of BLM's counterpart methane rule of Nov. 26, 2016. That postponement is the subject of another environmentalist lawsuit that is also before Judge Laporte.

New Mexico Attorney General Hector Balderas (D), a plaintiff in the ONRR lawsuit, said of Laporte's holding, "I'm pleased that a federal court agreed with us that Donald Trump broke the law as this is a big win for New Mexico's students, families and teachers." Again, New Mexico won't gain any revenue from the decision because the judge allowed ONRR to proceed to revoke the Obama policy with a formal rule-making.

Still, the implication of judge Laporte's decision and the D.C. Circuit decision is that BLM's deferral of methane regulations is of dubious legality.

There is already litigation from the other side – the oil and gas industry – underway against the BLM methane rule. On January 16 U.S. District Court Judge Scott W. Skavdahl in Wyoming refused for now to halt implementation of the Obama BLM rule. He held that industry plaintiffs, including the Western Energy Alliance, had not yet proved they would be harmed by the regulation.

Separately, 17 national and local environmental groups filed a new lawsuit in U.S. District Court for Northern California (Laporte's court) July 10 arguing the Administrative Procedures Act (APA) also forbade BLM from delaying its methane emissions rule.

For its royalty rule ONRR on February 22 postponed implementation; that is the action that was before judge Laporte. Subsequently ONRR on April 4 proposed outright repeal of the rule, combined with a solicitation of comments on a new proposed rule. Then on August 7 ONRR repealed the Obama rule, effective September 6.

In its August 7 rule ONRR laid out several "defects" in the Obama regulation that industry had faulted that justified cancellation of the rule. High on the list was a provision that would have allowed ONRR to substitute different valuation rules when it identified problems in a company's reporting.

In its July 1, 2016, rule the Obama regulations replaced an old standard that applied (and will now apply again) a series of benchmarks to set the royalty price. In the Obama rule ONRR would begin with a first affiliated sales price, followed by index prices. But now Bush administration rules are once again in force.

The attorneys general of New Mexico (Balderas) and California filed suit against the February 22 *delay* in implementing the ONRR rule. They argued that the APA forbids an agency from not implementing a rule until it has proposed a new rule and taken public comments, which ONRR had not done for the delay.

Judge Laporte agreed. "By acting outside its statutory authority to in effect repeal the Rule in February of 2017 without allowing the public to comment, ONRR improperly put the cart before the horse," she said. "While Defendants argue that its subsequent rulemaking included notice and comment to adopt the Repeal Rule months later, that does not cure the failure to give the public an opportunity to weigh in with comments beforehand as required by the APA."

**Royalty policy committee:** In a related development the Interior Department September 1 appointed 20 members to a Royalty Policy Committee that will advise ONRR on energy royalty policy.

The appointees include six industry officials, six state officials (five from the West), four Indian officials and four academia/public interest officials.

None of the public interest appointees come from the conservation/environmental community, which has often criticized the Trump administration's energy policy.

That prompted House Natural Resources Committee Ranking Member Raúl M. Grijalva (D-Ariz.) and Lowenthal to complain the royalty committee would be biased toward industry. "Nearly every move on energy that this administration has made could have come right out of the executive boardrooms of the oil and gas industry, and the make-up of this committee is no exception," said Lowenthal.

**The methane situation:** On June 14 BLM delayed the implementation of ten or so provisions of an Obama administration methane rule of Nov. 26, 2016. On July 10, 17 national and local environmental groups filed a lawsuit in Laporte's court arguing the APA forbade BLM from delaying its methane emissions rule.

For its part on April 30 EPA delayed implementation of a methane emissions rule for 90 days beyond a June 3 compliance deadline. On June 13 EPA proposed a two-year delay of the methane rule of June 3, 2016.

EPA had argued that it had broad discretion to revisit its own rules under the Clean Air Act. But the D.C. Circuit Court of Appeals ruled that the APA required a reproposal and comment period before suspending/terminating the rule.

Laporte's decision in the ONRR royalty case is available at:  
<http://www.nmag.gov/press-releases.aspx>.

Appropriators almost certainly will punt into December

Congress is attacking fiscal year 2018 public lands spending on parallel tracks. On one track House and Senate leaders are quickly moving an interim spending bill (HR 3672) to keep the government in money through December at fiscal 2017 levels.

On the second track, the House began debate this week on a bill (HR 3354) to supply money in fiscal 2018 for the Interior Department and Related Agencies. That would set the stage for more serious negotiations with the House in December after the extension bill is enacted.

Complicating things, House leaders have attached seven other spending bills to the Interior bill. The House leaders plan to move the eight-measure omnibus shortly and then couple it with another five-bill omnibus before sending the whole mass to the Senate.

Further complicating things the House is in the process of debating 224 amendments to HR 3354. Republicans had introduced amendments to prohibit spending for an onshore oil and gas measurement order, for implementing an EPA methane emissions rule, for an onshore oil and gas site security rule, for a BLM methane emissions rule and an onshore oil and gas royalty rule. The sponsors of many of those amendments earlier this year unsuccessfully attempted to use a Congressional Review Act to block Obama administration regulations.

The jumbo, 13-bill omnibus almost certainly won't move through Congress before fiscal year 2018 ends September 30. The interim spending bill, HR 3672, would pick up the slack into December. That is the bill that President Trump famously teamed up with Democratic leaders to (1) put up emergency money for Hurricane Harvey recovery and (2) increase the federal debt ceiling.

The House Appropriations Committee July 18 approved HR 3354 to supply money in fiscal 2018 for the Interior Department and Related Agencies. On July 20 the Senate Appropriations Committee established a ceiling for a counterpart bill, but that committee has not begun to flesh out a measure yet.

If and when the House and Senate Appropriations Committees get down to banging heads in December on an Interior bill, they will be first and foremost far apart on total spending.

The Senate committee spending ceiling for the Interior bill is \$600 million more than a House Appropriations Committee level (\$32 billion compared to the House number of \$31.4 billion). Further the Senate number is almost \$5 billion more than a Trump administration request of \$27.1 billion.

The House Appropriations Committee July 18 in its mark-up rejected several major Democratic amendments, including one that would have struck a rider from the bill that would ban any work on listing any wolf subspecies under the Endangered Species Act. Those riders/amendments may come under attack on the House floor.

But in the early House floor debate most public lands amendments were coming from western Republican members, who were trying to shoot down Obama administration energy regulations

**Wild horse rider:** The House Appropriations Committee did accept by voice vote a major amendment from Rep. Chris Stewart (R-Utah) that would allow for the disposal of wild horses and burros that BLM deems to be surplus.

In defending the amendment subcommittee on Interior appropriations chairman Ken Calvert (R-Calif.) argued, "The amendment only allows the humane euthanizing of unadopted horses and burros, just as we do for unadopted dogs and cats. This amendment does not allow horses and burros to be sold for processing for commercial products for consumption."

But Rep. Debbie Wasserman Shultz (D-Fla.) said, "This amendment would allow the cruel and inhumane practice of large-scale euthanasia of wild horses and burros. It's as simple as this: Americans overwhelmingly oppose the extermination of wild horses."

The Trump administration first proposed wholesale disposal of wild horses May 23 in releasing its fiscal year 2018 budget request by recommending the sale of excess animals for slaughter. How the Trump proposal fits in with the Stewart amendment is not clear, but both would authorize disposal of a large number of the 70,000 wild horses and burros on the public range. The range only has a carrying capacity of 26,000 animals, according to Stewart.

For BLM resource management and the National Forest System the House committee approved modest decreases. For BLM resource management the committee approved a decrease of \$20 million, from \$1.095 billion in fiscal 2017 to \$1.075 billion in fiscal 2018. For the National Forest System the committee also approved a decrease of \$20 million, from \$1.513 billion in fiscal 2017 to \$1.493 billion in fiscal 2018.

The committee allocations for some public lands programs were a little higher than those numbers would at first suggest, because the panel reduced allocations to federal land acquisition under the Land and Water Conservation Fund. Thus the National Forest System allocation actually increased by a small amount outside of land acquisitions.

As has become customary, wildfire suppression ate up a significant portion of the subcommittee's \$31.4 billion allocation, \$3.4 billion, or about 11 percent of the total. And the committee did not act on recommendations that it attempt to shift emergency wildfire costs out of the bill and into disaster funding.

The committee set aside \$465 million for the payments-in-lieu of taxes (PILT) program, which Congress has occasionally paid for outside of appropriations bills. The \$465 million matches the fiscal 2017 appropriation. The Trump administration had recommended \$397 million for PILT.

The amendments/riders in the bill include such things as a ban on implementing a wetlands regulation; a ban on listing the greater sage-grouse as threatened or endangered under the Endangered Species Act; and a ban against delisting of the gray wolf in Wyoming.

The legislation would also ban the listing of any wolf species in the lower 48 states as threatened or endangered under the Endangered Species Act.

That blanket ban would forbid the use of funds to "treat" any wolf species as threatened or endangered under the act, including the Mexican gray wolf. The Fish and Wildlife Service June 30 proposed a new recovery plan for the endangered Mexican gray wolf that anticipates a future population in the Southwest of the United States of 320 wolves, plus 170 in Mexico. The population of the lobo, the most endangered of the wolf subspecies in the world, is currently 130 in Arizona and New Mexico.

### Zinke taking aim at Utah monuments; would it be legal?

Although Secretary of Interior Ryan Zinke on August 24 did not identify the handful of national monuments he recommended that President Trump alter, the reactions of key senators and press reports pretty much narrow it down.

Reportedly on the chopping block are significant portions of the Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in Utah, Cascade-Siskiyou National Monument in Oregon, Rio Grande del Norte National Monument in New Mexico and Organ Mountains-Desert Peaks National Monument in New Mexico.

Spared for the most part is the Katahdin Woods and Waters National Monument in Maine, which had been prominently mentioned for revocation. It is managed by the National Park Service.

Perhaps as important as boundary changes are Zinke's possible recommendations to expand land uses within monuments, such as grazing, hard rock mining, oil and gas drilling, timber harvesting.

In preparing his recommendations Zinke told the *Associated Press* that he did not recommend to President Trump the complete revocation of any of the 27 monuments he reviewed. The secretary posted a summary of a report he submitted to President Trump but that summary did not identify which monuments Zinke would shrink and by how many acres. Or what land uses he would expand.

In not proposing the outright revocation of any monuments Zinke may have taken away his critics' strongest legal argument against the review, assuming President Trump follows his lead. That is, no President has ever rescinded a national monument under the Antiquities Act of 1906.

Nevertheless, environmentalists such as the Earthjustice environmental law firm indicated that they would file a lawsuit if President Trump attempted to reduce the size of any monument.

As a preliminary step Earthjustice filed a Freedom of Information Act demand with the Interior Department August 25 seeking all department communications on Zinke's review.

"As Secretary Zinke is keeping the American people in the dark about his proposal to strip national monument protections from millions acres of iconic wilderness and priceless cultural sites, we are turning to the Freedom

of Information Act to compel him to do so," said Heidi McIntosh, Earthjustice's managing attorney in the Rocky Mountain region.

Despite the lack of detail in Zinke's public postings, the reaction of senators who have learned of the department's intentions suggest that President Trump will make major changes to Bears Ears, Grand Staircase, Cascade-Siskiyou, Rio Grande del Norte and Organ Mountains-Desert Peaks.

Zinke's review was met with applause by the all-Republican Utah Congressional delegation, which has been championing for either a reduction in size of Bears Ears or a revocation of the Dec. 28, 2016, designation of the 1.35 million-acre monument by President Obama. And they have campaigned for a reduction in size of the 1.9 million-acres Grand Staircase Monument designated by President Clinton in 1996.

Said Sen. Orrin Hatch (R-Utah), "While Utah's national monuments are a prime example of Antiquities Act abuse, President Trump and Secretary Zinke are working to correct those past abuses and focus on the original meaning and intent of the law."

From the other side of the political fence Sen. Ron Wyden (D-Ore.) anticipates either a reduction in size of the 103,000-acre Cascade Siskiyou National Monument in Oregon or an expansion of consumptive land uses there, or both.

"This after-the-fact scheme to gouge away at the Cascade-Siskiyou monument insults the Oregon Way and the many Oregonians who spoke up in favor of protecting this pristine place for generations to come," said Wyden.

President Clinton designated an original 53,000-acre Cascade-Siskiyou monument in 2000 and President Obama expanded it by 50,000 acres January 12, for a total of 103,000 acres.

Sen. Tom Udall (D-N.M.) said he was disappointed in Zinke's recommendations on Rio Grande del Norte (242,000 acres and designated by President Obama in 2013) and Organ Mountains-Desert Peaks (496,000 acres and designated by Obama in 2014).

"New Mexicans have spoken loudly and clearly," said Udall. "They do not want to shrink our national monuments - and they deserve to know what the administration plans to do with the natural treasures they have worked for years to protect."

Zinke is expected to largely leave in place an 87,500-acre Katahdin Woods and Waters National Monument in Maine, despite the recommendation of Gov. Paul LePage (R-Me.) that it be revoked.

That expectation comes in part from a statement of monument supporter Rep. Chellie Pingree (R-Me.), who said she liked Zinke's review. She was quoted in the *Bangor Daily News* as saying she favored the secretary's "deliberative study of the monument, his recommendation to protect it."

Environmentalists made explicit their intention to file a lawsuit if President Trump acted on any of Zinke's recommendations. Said Drew Caputo, Earthjustice's vice president of litigation for lands, wildlife and oceans, "The law is clear: only Congress has the authority to change a national monument designation under the Antiquities Act - not the president. If

President Trump attempts to carry out any recommendations to gut or shrink our national monuments, we will see him in court."

Ranking Senate Energy Committee Democrat Maria Cantwell (Wash.) agreed, "As I've said for months, the President does not have the legal authority to overturn these protections."

Before Zinke submitted his report to the White House, 16 western Republican Congressmen threw down an opposite gauntlet in the form of a House Western Caucus position paper. It recommended the complete rescission of ten monument designations and the modification of 13 more. The caucus would not change the boundaries of four monuments.

Among the 16 monuments the Republicans would do away with are Bears Ears, Grand Staircase, Cascades-Siskiyou and Katahdin. Not on their list for outright elimination are Rio Grande del Norte and Organ Mountains-Desert Peaks.

During his review Zinke said the following six monuments would not be touched: Craters of the Moon National Monument and Preserve in Idaho, Hanford Reach National Monument in Washington, Canyons of the Ancients National Monument in Colorado, Upper Missouri River Breaks National Monument in Montana, Grand Canyon-Parashant National Monument in Arizona, and Sand to Snow National Monument in California.

Zinke's report is available at:  
[https://www.doi.gov/sites/doi.gov/files/uploads/so3353\\_memo\\_coverletter\\_report\\_080717.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so3353_memo_coverletter_report_080717.pdf).

The Earthjustice Freedom of Information request is available at:  
<http://earthjustice.org/sites/default/files/files/FOIA-for-Zinke-Recommendations.pdf>.

**The legal debate:** Contrasting reports have been posted in the last year on the legality of a President's authority to unilaterally revoke or revise a national monument designation.

A 1938 U.S. Attorney General opinion and a Congressional Research Service report of last fall doubt Trump enjoys such authority. But an American Enterprise Institute (AEI) report published this spring argues that he does.

The Antiquities Act of 1906 is fairly simple. The crucial provision says, "That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. . ."

In 1938 Attorney General Homer Cummings, asked by the President Franklin Roosevelt administration about the legality of abolishing a Castle-Pinckney National Monument in South Carolina, said the President had no such authority. Congress later abolished the monument with legislation.

Argued Cummings of the Antiquities Act, "The statute does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists by implication." He added that no other "implication" existed.

The Congressional Research Service, keying on Cummings opinion, said, "No President has ever abolished or revoked a national monument proclamation, so the existence or scope of any such authority has not been tested in courts. However, some legal analyses since at least the 1930s have concluded that the Antiquities Act, by its terms, does not authorize the President to repeal proclamations, and that the President also lacks implied authority to do so."

But in late March the influential American Enterprise Institute (AEI) published its report that argues Trump has unlimited authority to de-designate national monuments.

Researchers John Yoo and Todd Gaziano argued that other legal precedent does allow Trump to reverse such national monument designations. Referring to the 1938 decision of Cummings, Yoo and Gaziano say, "We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists."

They add, "We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances."

The Congressional Research Service report is available at: [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf). The American Enterprise Institute report is available at: <http://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revocate-or-Reduce-National-Monument-Designations.pdf>.

### Few bumps in the road in hearing for two DoI nominees

Two key Trump administration public lands nominees emerged relatively unscathed September 7 from a confirmation hearing in the Senate Energy Committee.

Democratic senators offered few serious objections to the nomination of Ryan Nelson as Interior Department Solicitor or Joseph Balash as assistant secretary of the Interior for Land and Minerals Management.

Despite the relatively smooth sailing for Balash and Nelson, the Trump administration continues to operate without most of its public lands cadre in the Interior Department.

Other than Ryan Zinke as secretary and David Bernhardt as deputy secretary, the department is largely operating under the guidance of acting assistant secretaries and acting agency heads.

The Forest Service is doing better because former chief Tom Tidwell, who had been in office since 2009, continued in that position until September 1. On September 1 service veteran Tony Tooke took over. The chief does not require Senate confirmation.

At the confirmation hearing for Nelson September 7 Senate Energy Committee Chairman Lisa Murkowski (R-Alaska) praised Nelson, the former general counsel of a wellness company. "I welcome the nomination of Ryan Nelson of Idaho, a westerner and a seasoned general counsel," she said.

Nelson does have extensive experience with public lands litigation, including a stint as deputy assistant attorney general for the Environment and Natural Resources in the Justice Department.

Ranking committee Democrat Maria Cantwell (D-Wash.) was noncommittal about Nelson and Balash because she said she has not yet had an opportunity to meet with them personally.

Murkowski also sang the praises of Balash, who was Sen. Dan Sullivan's (R-Alaska) chief of staff and a former commissioner of the Alaska Department of Natural Resources.

"He's a fellow Alaskan, which should be enough to convince everyone to vote yet on his nomination," said Murkowski. "I've worked closely with him . . . and I truly cannot say enough about his understanding and knowledge of the issues. I think he will be an excellent assistant secretary overseeing BLM (and other agencies)."

The Alaska Wilderness League did take a shot at Balash for his advocacy of energy development in Alaska. "There's no doubt that, if confirmed, he will be advocating alongside a growing list of this administration's political appointees who seem dead set on drilling in the Arctic Refuge - despite the law and the will of the American people," said Kristen Miller, interim executive director of the league. "Balash is the wrong choice to act in the public interest and to protect iconic national treasures like the Arctic National Wildlife Refuge."

Murkowski's attitude toward Trump administration nominees is being closely watched because she voted against a health care bill supported by the President in July. Both the President and Zinke reportedly leaned on Murkowski to support the bill. That, in turn, raised the possibility that Murkowski might exact revenge of her own by holding up Trump nominees.

Indeed on July 27 Murkowski canceled a scheduled committee vote on former Texas Comptroller Susan Combs as assistant secretary of Interior for Policy. The Combs vote has not been rescheduled yet.

Meanwhile, as we have reported, Secretary of Interior Ryan Zinke has suggested strongly that he will attempt to move the headquarters for BLM, the Fish and Wildlife Service, and the Bureau of Reclamation from Washington, D.C., to Denver.

In a July meeting with U.S. Geological Survey executives Zinke said the transfer would be part of his plan to shift personnel from Washington and regional headquarters to the front lines.

For their part Rep. Scott Tipton (R-Colo.) and Sen. Cory Gardner (R-Colo.) introduced legislation (HR 2287, S 1007) in May that would authorize the transfer of BLM's headquarters from Washington, D.C., to one of 12 western states. The bills would allow the secretary of Interior to choose a new location.

In addition Zinke said he intends to combine management of federal lands via inter-agency joint management areas (JMAs) with JMA leadership shifting among agencies.

As part of the Trump administration's ambitious government-wide program to reduce federal spending, the Interior Department budget would reduce employee levels by six percent, from 64,000 to 60,000 full-time equivalents. For the Park Service alone the budget would take away 1,242 jobs, reducing the number of full-time equivalent employees from 19,510 to 18,268.

### Battles over O&G lease sales break out across the West

The Utah State Office of BLM said August 31 it intends to offer for oil and gas lease sale in December 94,000 acres of public lands, touching off a new contest over fossil fuels energy development in the West.

The 94,000 acres include 75 parcels in Duchesne, Uintah and Emery counties in areas environmentalists say should not be leased.

In addition, one tract included in the sale parcel 071 is close enough to Dinosaur National Monument to draw the concerns of Trump administration ally Utah Gov. Gary Herbert (R-Utah).

Herbert actually objected to the sale of three tracts near Dinosaur, but BLM delayed the sale of one tract and withdrew a third.

Said Herbert in response to BLM's original sale plan, "The State requests BLM re-evaluate parcels 069, 070, and 071 to determine whether there is a better choice of leasing category. As the parcels are near the boundary of Dinosaur National Monument, the State wishes to ensure easing of these parcels does not impact visual resources or cause light or sound disturbances within the National Monument." Herbert said he supported the sale of most of the rest of the tracts proposed by BLM.

Environmentalists were more vociferous in their objections to the sale scheduled for the week of December 10, arguing that it harkened back to the oil and gas leasing wars in Utah in the George W. Bush administration.

Said Landon Newell, a staff attorney with the Southern Utah Wilderness Alliance, "BLM has quickly come full circle and brought us back to the 'drill now-drill everywhere' days of the early 2000s, and once again Utah is front and center on the national stage for these disastrous policies."

Separately, a coalition of retired Park Service officials last week asked the Interior Department not to follow through on oil and gas lease sales near six national park units in the West.

That doesn't count separate disputes over possible oil and gas development near Rocky Mountain National Park and Canyonlands National Park in Utah.

The Coalition to Protect America's National Park told Secretary of Interior Ryan Zinke that as veteran land managers they understood the need to balance protection of the parks with energy development. "But," they said in an August 29 letter, "we fear the pendulum is swinging too far to the side of development."

The coalition, led by the chair of its executive council, Maureen Finnerty, wrote, "We are writing out of concern for the alarming number of oil and gas proposals that are advancing next to national parks, as well as broader efforts by the Interior Department to reduce protections for national parks in order to encourage oil and gas drilling."

The coalition of retirees is most concerned about the impact of proposed sales near Zion National Park (Utah), Dinosaur National Monument (Colorado and Utah), Capitol Reef National Park (Utah), Chaco Culture National Historical Park (New Mexico), Hovenweep National Monument (Colorado and Utah), and Fort Laramie National Historic Site (Wyoming).

The retirees are not only upset about upcoming oil and gas lease sales themselves, most of which were prepared under the Obama administration, but also they are concerned that the Trump administration will cut back on pre-lease and pre-development planning.

Said the coalition in its letter to Zinke, "Those policies, which include the Master Leasing Plan policy, are protecting our national parks, while reducing conflicts with proposed oil and gas development."

BLM has already said it would not follow through on several master leasing plans in Utah.

Other environmental groups such as WildEarth Guardians are objecting to sales near Rocky Mountain National Park in Colorado and Canyonlands National Park in Utah.

The Trump administration in general and Zinke in particular have made no secret of their desire to expand oil and gas development on the public lands. That campaign is delineated in a July 6 executive order from Secretary of Interior Ryan Zinke directing BLM to make sure each state office holds quarterly oil and gas lease sales and identifies impediments to swift processing of applications for permit to drill (APDs).

The environmentalists have mounted a campaign to eliminate fossil fuels development on the public lands, a campaign to that runs 180 degrees opposite the Trump campaign to increase fossil fuels development on the public lands.

The Keep-it-in-the-Ground initiative has some Senate Democratic support led by Sen. Jeff Merkley (D-Ore.). He has introduced two bills to eliminate oil, gas and coal leasing on the public lands (S 750, S 987).

Separate from the national park retirees the National Parks Conservation Association has long focused on blocking a proposed oil refinery near Theodore Roosevelt National Park's boundary in North Dakota. The refinery would be built by Meridian Energy Group near Belfield, N.D.

Said Stephanie Kodish, clean air program director for the National Parks Conservation Association, "The park is already negatively impacted by

air pollution, without a massive oil refinery at its doorstep. The question is not whether it will do additional harm to the park but rather how much."

The Zinke secretarial order is available here: <https://www.doi.gov/sites/doi.gov/files/uploads/doi-so-3354.pdf>. The Coalition to Protect America's National Parks' letter is available at: <http://protectnps.org/>

**Utah history:** On Dec. 19, 2008, the Bush administration BLM sold 116 parcels in a State of Utah oil and gas lease sale that created a national controversy. Environmentalists immediately filed a lawsuit charging that many of the parcels were too close to wild public lands with wilderness potential.

Subsequently, a federal judge on Jan. 16, 2009, blocked the issuance of 100,000 acres of the leases and suggested the environmentalist litigants would probably succeed in a lawsuit against BLM. At that point former Secretary of Interior Ken Salazar in February 2009 withdrew 77 parcels that had been sold, touching off litigation from the oil and gas industry.

About that time the Obama administration revised BLM's oil and gas leasing and permitting system from top to bottom, adding another layer of environmental reviews prior to leasing.

More information about the planned December Utah oil and gas lease sale is available here, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/utah>.

Gov. Herbert's letter is available at: <http://suwa.org/wp-content/uploads/Herbert-Letter-on-Dinosaur-NM-leases.pdf>.

### Energy bills favoring states given hearing in the House

Legislation to boost states' roles in the management of fossil fuels on the public lands has been around for years, without moving. But times are changing and on September 6 the House Natural Resources Committee gave two such bills a hearing.

One measure (HR 2661) would give western states a full 50 percent of fossil fuel energy royalties from onshore public lands. They now receive 49 percent and the feds 51 percent.

The other more controversial measure (HR 3565) would turn oil and gas leasing and permitting over to states that have an established program, if the states so requested.

Although the bills are still long shots, they stand a better shot with a Republican in the White House who is eager to expand energy development on the public lands, i.e. President Trump.

The chairman of the House subcommittee on Energy and Mineral Resources, Rep. Paul Gosar (R-Ariz.), strongly endorsed the bill to transfer public lands energy development to the states. Gosar chairs the subcommittee that held the September 6 hearing and he also chairs the Congressional Western Caucus.

"The federal government has imposed a one-size-fits-all regulatory scheme for oil and gas development that fails to recognize the geography, resources and environment of each state," he said. "For too long environmental reviews, frivolous protests and unnecessary permitting delays have discouraged producers from developing federal lands."

However, ranking subcommittee Democrat Alan Lowenthal (D-Calif.) blasted the bill. "This is a terrible idea," he said. "The bill would gut the public's ability to participate in oil and gas decision-making. It would cause huge conflicts over the uses of the public lands such as fishing, hunting and grazing. It would effectively hand public lands management over to oil and gas companies in each state."

At the hearing industry witnesses supported both bills. Paul Ulrich, chairman of the Petroleum Association of Wyoming, said of the bill go give states 50 percent of royalties, "By returning the 2 percent administration fee and allowing Wyoming to administer the program you are assured that mineral revenues are properly paid, collected and accounted for. You are also sending a strong message that states and the federal government are equal partners." Ulrich is also director of government affairs for Jonah Energy LLC.

Of the state control bill he described an effective Wyoming state program and said, "In sum, states have, and can, manage our public lands very effectively. Often more efficiently and with greater overall results for energy development and natural resource protection."

Another witness, John Ruple, associate professor of law at the University of Utah, said the transfer of public lands energy management to the states would endanger the environment.

"BLM and Forest Service-managed lands are public lands, and the public benefits from opportunities to engage in oil and gas project planning and development decisions involving their lands," he said. "EISs are part of an iterative analytical and decision-making process under which the public has multiple opportunities to engage in issue identification, development of alternatives, impact analysis, and weighing the inevitable tradeoffs that will occur. HR 3565's exemption from NEPA deprives American citizens of important opportunities to provide input on the management of, what is after all, their lands."

Ruple gained some notoriety in 2015 for co-writing a white paper that held that the transfer of 31 million acres of public lands to the State of Utah, as the state legislature had ordered, would disrupt the state's finances. He said in a February 2015 report the state would need \$100 million per year more than the public lands now generate. The feds now spend \$247 million to manage the lands, plus the state would lose \$35 million in federal payments and \$150 million in mineral leasing revenues.

The revenue sharing bill is another matter. Since fiscal year 2008 Congress has directed the Office of Natural Resources Revenue to deduct two percent of the state share of onshore energy royalties and use the money for administering the royalty collection program. The two percent amounts to \$26 million or more per year, said Gosar.

Ever since then western legislators led by Wyoming officials have led a campaign to kill the provision and return the extra money to the states.

Wyoming Rep. Lynn Cheney (R) and Wyoming Sen. Mike Enzi (R) are prime sponsors of this year's bills (HR 2661, S 1267).

Said Cheney on introducing her bill, "The introduction of this legislation today will make Wyoming whole again and ensure that Wyoming receives our share of the mineral royalties."

The legislation to authorize the transfer of the federal oil and gas programs to the states comes from Rep. Diane Black (R-Tenn.) and nine Republican cosponsors. Black has been introducing the bill since 2013.

In the last Congress the House subcommittee on Energy and Minerals held a hearing on Black's bill on Nov. 15, 2016, but the measure went no further. A Senate counterpart bill from Sen. James Inhofe (R-Okla.) didn't move at all.

The Black bill would deem approved a state application for authority over "leasing, permitting, or regulating of oil and gas exploration, development, and production activities," if the secretary of Interior ruled a state had the ability to manage oil and gas leasing.

#### Lawsuits would attempt to keep Yellowstone grizzly listed

As they promised, one set of environmental groups August 30 filed a lawsuit against the Trump administration for delisting the Yellowstone population of the grizzly bear under the Endangered Species Act (ESA). On September 6 a separate group filed a similar suit.

The previous two administrations also attempted to delist the Yellowstone grizzly. The plaintiffs faulted all their efforts for relying on pure numbers of grizzlies in the ecosystem to justify delisting and for not giving credence to the bear's changing diet.

That is, the plaintiffs in the first suit, led by the Earthjustice environmental law firm, said the grizzly bear's diet has shifted from the seeds of the whitebark pine tree to meat, with potentially disastrous consequences.

The suit, filed in U.S. District Court for the District of Montana, says the Fish and Wildlife Service (FWS) "failed to rationally explain why Greater Yellowstone grizzly bears are not threatened by a recent dietary shift toward more extensive reliance on meat food sources that yields increasing conflicts with hunters and ranchers, increasing conflicts among grizzly bears, and, therefore, increasing grizzly bear mortalities."

The suit further argues that FWS should have examined the Yellowstone grizzly within the greater population of the grizzly in the lower 48 states, not just as a distinct remnant population.

"Despite Interior's claim, the long-term health of Yellowstone and Grand Teton grizzlies is far from certain," said Stephanie Adams, Yellowstone program manager for National Parks Conservation Association. "We must ensure Yellowstone grizzlies have necessary protections in place for the population to thrive."

On September 6 three other environmental groups filed a similar lawsuit in the same federal court. The Alliance for the Wild Rockies, Western Watersheds Project and Native Ecosystems Council filed the second suit.

Not all conservation groups say the Yellowstone grizzly should be listed. Tom France, regional executive director of the National Wildlife Federation's Northern Rockies Regional Center, said, "The purpose of the Endangered Species Act is to create self-sustaining populations of species in the wild. This has happened – we are now seeing grizzlies in places where they haven't been recorded for a century. We should all celebrate this success."

Management of the Yellowstone bear is being turned over to the States of Wyoming, Montana and Idaho. The grizzlies that stay within the borders of Yellowstone National Park will be managed by the Park Service and will be subject to state rules only if they leave the park.

Secretary of Interior Ryan Zinke described the recovery of the Yellowstone grizzly as a major success. "This achievement stands as one of America's great conservation successes; the culmination of decades of hard work and dedication on the part of the state, tribal, federal and private partners. As a Montanan, I'm proud of what we've achieved together," he said.

FWS published a grizzly bear recovery plan in 1993. FWS first delisted the Yellowstone population in 2007 but a federal judge vacated that action. In March 2016 the Obama administration proposed delisting. On June 30 the Trump administration formally delisted the bear, effective July 31.

The population of Yellowstone grizzlies has increased from 136 in 1975 to an estimated 700 today. That may even open the way for the states to hold hunting seasons. Grizzly bears once roamed from Alaska to Mexico. A population of 1,000 grizzlies in northern Idaho and Montana will remain listed under the ESA.

#### BLM redoing Gateway West route after Hill interjects

Acting under orders from Congress, BLM August 28 began reconsideration of two routes it approved in January as part of the giant Gateway West transmission line project.

Idaho officials had objected to the 321-mile routes BLM selected for segments 8 and 9 of the 1,000-mile project. So Rep. Mike Simpson (R-Idaho) inserted a provision in a fiscal year 2017 appropriations bill (PL 115-31 of May 5) that directs BLM to reroute the segments through the Morley Nelson Snake River Birds of Prey National Conservation Area. The provision also removes the proposed transmission route from the conservation area.

BLM approved the last two segments of the right-of-way (ROW) on January 20, the last day of the Obama administration. BLM had approved the initial seven segments of the ROW on Dec. 12 2013. The nine segments extend the length of the 1,000-mile transmission line.

The ROW would transmit conventional and renewable energy (primarily wind) from Glenrock, Wyo., to Melba, Idaho, across state lands (73.4 miles), private lands (434.9 miles), and federal lands (472 miles).

When BLM signed off on the last two segments in January Idaho Gov. C.L. "Butch" Otter (R), local communities, private landowners and environmentalists criticized the project for a variety of reasons. Otter said it would interfere with an Idaho sage-grouse plan. The counties said the project was not consistent with their management plans. And environmentalists said the project would cause too much damage.

Former BLM Director Neil Kornze who signed the decision said, "Gateway West has been an Administration priority project to transform our electric power grid and spur development of renewable energy. Today's decision authorizes the routes with the least impact on private property, farmland, historic trails and cultural resources, visual resources, wetlands, sage grouse habitat, and the Birds of Prey National Conservation Area."

At that juncture Simpson moved on the side of Otter and other critics of the last two segments by inserting a land exchange provision in the fiscal 2017 appropriations bill.

The provision, based on a stand-alone bill (HR 2104) from Simpson, excludes from the conservation area 761 acres for Segment 8 and 1,845 acres for Segment 9. It then directs BLM to issue a right-of-way across the excluded conservation area lands for Segments 8 and 9.

In return for the exclusion of the two segments the provision adds 4,800 acres of BLM and Bureau of Reclamation land to the conservation area.

Simpson said the provision is good for everybody. "This (overall spending) bill contains many important provisions for Idaho including an agreement that allows the Gateway West Transmission line to pursue an Idaho-based solution while enhancing the Birds of Prey conservation area. This is a win-win for Idahoans."

The Conservation Lands Foundation agreed. "We are delighted this provision was signed into law," said Danielle Murray, senior director of programs for the National Conservation Lands. "This law expands protections for the unique raptor and eagle habitat in southern Idaho, while also allowing for the development of much needed energy infrastructure."

The segments through Birds of Prey are the preferred routes recommended by Idaho Power Co.

According to BLM's timetable Idaho Power submitted an initial application on May 7, 2007. In May 2009 BLM published a draft EIS. In March 2010 it published a second draft EIS. In April 2013 the EIS on the first seven segments was completed.

Gateway West was one of seven high priority energy development projects identified by the Obama administration.

## IBLA decisions

(We post current Interior Board of Land Appeals decisions at our website, <http://www.blinfor.com/ibla.htm>. IBLA may be contacted at: Interior Board of Land Appeals, 801 North Quincy St., MS 300 QC, Arlington, VA 22203. Phone (703) 235 3750.)

**Subject:** Oil and gas project.

**BLM decision:** BLM will approve an oil and gas leasing project consisting of vertical oil wells.

**Appellant environmental group:** BLM should have considered the possibility of directional drilling.

**IBLA decision:** Affirmed BLM, directional drilling not feasible.

**Case identification:** *Southern Utah Wilderness Alliance*, 191 IBLA 37. Decided August 30, 2017. Twelve pages. Appeal from a decision of the Deputy State Director of the Utah State Office of BLM, affirming a field office's approval of a project that includes drilling 22 vertical oil and gas wells. DOI-BLM-UT-G010-2014-0251-EA.

**IBLA argument:** IBLA Administrative Judge Amy B. Sosin upheld a BLM decision approving the drilling of 24 vertical oil wells in Uintah County, Utah. The appellant environmental group argued that BLM failed in an environmental assessment to consider adequately the possibility of directional drilling. But BLM said the wells would have been too shallow for directional drilling and would have been too expensive. Sosin agreed.

**Subject:** Mining claim.

**BLM decision:** BLM will declare 32 mining claims forfeited because claimants were related parties and did not qualify for maintenance fee exemption.

**Appellant claimants:** BLM erred because the four claimants are separate entities and simply used the same representative.

**IBLA decision:** Affirmed BLM.

**Case identification:** *John Herzog, et al*, 191 IBLA 26. Decided August 30, 2017. Twelve pages. Appeal from decisions of the Arizona State Office of BLM, declaring placer mining claims forfeited for failure to pay annual maintenance fees or submit valid small miner waiver certifications. AMC 432957 through AMC 432988.

**IBLA argument:** IBLA Administrative Judge James F. Roberts upheld a BLM decision finding that 32 mining claims were forfeited because the four claimants were related. BLM argued that the representative who filed a small miner waiver from annual maintenance fees for four individuals was more than just an agent for the claimants. BLM said the representative, John Herzog, exerted control over all the claims. Said Roberts, "But the facts of this case demonstrate that Herzog plays a much more significant role than that of a mere agent. Based on the facts noted, we agree with BLM that Herzog exerts control over the claims at issue, and that he and the other Appellants are related parties under the law rather than mere parties to an agent-client relationship." The four individuals here were attempting to obtain small miner waivers from maintenance fees for eight claims each. Under the law a small miner may obtain waivers for up to 10 claims. But the law doesn't allow "related parties" to control more than 10 claims, as Roberts and BLM said was the case here.

## Notes

**Tooke replaces Tidwell at FS.** Secretary of Agriculture Sonny Perdue September 1 swore in Tony Tooke, the former regional forester for the Southern Region of the Forest Service, as Forest Service chief. Tooke replaced Tom Tidwell, who retired after 40 years with the Forest Service. Tooke most recently served as the regional forester for the Southern Region of the Forest Service. Although the Obama administration appointed Tidwell chief in 2009, the Trump administration kept him on until last week. Perdue said he and Tooke will attempt to resolve a Forest Service budgeting problem that eats up 55 percent of the agency's appropriations for fire fighting. "I am committed to finding a permanent solution to this budget imbalance, and Tony's leadership will be key to accomplishing that goal," said Perdue. The Wilderness Society, no friend of the Trump administration, had positive words for Tooke. "Tooke has a strong record of accomplishment in bringing together diverse interests and forging new partnerships to help the Forest Service meet the many challenges facing our nation's forests," said Mike Anderson, senior policy analyst with the society.

**Bundy trial set for October.** A federal judge said August 31 that she will begin trying Cliven Bundy and six other defendants on October 10 for their role in a 2014 armed standoff over grazing rights in Nevada. U.S. District Judge Gloria Navarro in the Nevada District will host the trial of Bundy and his colleagues for preventing BLM from rounding up cattle being grazed on the public range. Some of the defendants in the Nevada trial were also tried in federal court in Nevada for occupying the Malheur National Wildlife Refuge in Oregon in January 2016. Although the main players in the Malheur occupation were found innocent of criminal charges, four minor players were convicted in early March. Among those found innocent were occupation leaders Ammon and Ryan Bundy. The three Bundys are among 19 defendants who the feds say participated in a 2014 armed standoff in a case involving grazing by permittee Cliven Bundy. The federal government is also attempting to collect more than \$1.1 million in fees and penalties from Bundy for illegally grazing on public land. On August 29, 39 Idaho state legislators wrote Attorney General Jeff Sessions and asked him to free two of the defendants and to allow Ammon Bundy out of jail on bail. The Idaho legislators said several of the defendants, including several from Idaho, have been tried before and cleared by deadlocked juries. "Further exploitation of these citizens would be an affront to justice and notice to the public of prosecutorial harassment," the legislators, led by state Rep. Dorothy Moon (R-Idaho), wrote Sessions.

**BLM beefs up O&G online system.** BLM said August 31 that it has improved its oil and gas leasing nomination system. The system is used to identify tracts for possible competitive oil and gas lease sales. The Obama administration did take one huge step that it said would speed permit and lease approvals processing paperwork electronically. Late last year it began holding lease sales electronically instead of through in-person bidding. Then on February 7 the Trump administration published an Obama administration-generated rule that makes online filing of drilling permits the standard procedure, subject to some exceptions. Now the Trump administration says it has improved the lease nomination system to allow tracking of expressions of interest at its website, <https://nflss.blm.gov>. BLM said it has entered 1,252 expressions of interest in leasing into its system since September 2016.

## Boxscore of Legislation

### **Fiscal year 2018 appropriations**

HR 3354 (Calvert). House committee approved July 18. On House floor at press time. Would reduce spending for most public lands programs, but not as much as the Trump administration has requested.

### **Fiscal year 2017 appropriations (full year)**

HR 244 (Cook). President Trump signed into law May 5 as PL 115-31. Appropriates roughly same amounts of money as fiscal 2016. Was stripped of riders.

### **Rule restrictions**

HR 21 (Issa). House approved January 4. Would allow Congress to revoke groups of regulations at one time with majority vote (no Senate filibuster.)

HR 5 (Goodlatte). House approved January 11. Would subject BLM and FS plans to major economic impact analysis.

*(Specific rules)* HJ Res 36 (Bishop), HJ Res 44 (Cheney), HJ Res 35 (Young). President Trump signed into law March 27 (PL 115-12) a resolution reversing a BLM planning rule (HJ Res 44). Trump signed into law April 3 a resolution (PL 115-20) reversing a FWS hunting rule in Alaska (HJ Res 35). The Senate defeated 51-to-49 a resolution that would have reversed a BLM methane emissions rule (HJ Res 36).

**Federal land transfers**

H Res 5 (McCarthy). House approved January 3. Would not require economic offsets if Congress tried to transfer federal lands to states, local governments or tribes.

HR 232 (Young). Young introduced January 3. Would allow states to acquire up to 2 million acres of national forest.

**National monument restrictions**

S 33 (Murkowski), S 132 (Crapo). Murkowski introduced January 5. Crapo introduced January 12. Murkowski would require Congressional and state approval of new monuments. Crapo would require Congressional approval.

**New national monuments**

HR 360 (Grijalva). Grijalva introduced January 6. Would establish a Greater Grand Canyon Heritage National Monument.

**Wildfire**

HR 2862 (Simpson), HR 2936 (Westerman). Simpson introduced June 8. House committee approved HR 2936 June 27. Both would transfer emergency fire spending to disaster category; Westerman would also accelerate timber sales.

**Greater sage-grouse**

HR 527 (Bishop), S 273 (Risch). Bishop introduced January 13. Risch introduced February 1. Would largely revoke federal sage-grouse management policy and give the job to the states.

**Wolf in Wyoming**

HR 424 (Peterson, Cheney), S 164 (Johnson). Peterson introduced January 10. Johnson introduced January 17. Would maintain the delisting of the gray wolf in Wyoming, overcoming a judge's decision. (In House committee's fiscal 2018 approps bill.)

**Critical minerals**

HR 520 (Amodei), S 145 (Heller). House hearing March 21. Senate hearing March 28. Would have federal land managers establish time lines for acting on all mineral permits.

**Energy bill (omnibus)**

S 1460 (Murkowski). Murkowski introduced June 28. On Senate agenda. Would revise dozens of energy policies.

**Energy policy limitations**

S 737 (Markey), S 800 (Cantwell), HR 1819 (Cartwright), S 750 (Merkley), S 987 (Merkley). Markey introduced March 27. Cantwell and Cartwright introduced March 30. Merkley introduced March 28. Merkley introduced April 27. Markey would increase coal royalty, Cantwell and Cartwright would forbid coal self-bond, and Merkley would forbid new fossil fuels leasing from the public lands.

**County assistance**

S 1027 (Hatch), HR 2340 (Rodgers). Hatch, Rodgers introduced May 3. Would reauthorize Secure Rural Schools program for two years.

**Arctic National Wildlife Refuge (development)**

S 49 (Murkowski). Murkowski introduced January 5. Would open coastal plain to O&G development.

**Arctic National Wildlife Refuge (wilderness)**

HR 1889 (Huffman), S 820 (Markey). Huffman and Markey introduced April 4. Would designate coastal plain as wilderness.

**BLM foundation**

HR 1668 (Hice) HR 244 (Cook). President Trump signed the fiscal 2017 appropriations bill into law May 5 as PL 115-31 that establishes a BLM foundation, like those supporting NPS, FWS and FS.

**Land and Water Conservation Fund**

HR 502 (Grijalva), S 569 (Cantwell), S 896 (Burr), HR 2836 (Simpson), HR 2943 (Barragán). Grijalva introduced January 12. Cantwell introduced March 8. Burr introduced April 7. Simpson introduced June 8. Barragán introduced June 21. HR 502, S 569, and S 896 would make the program permanent. HR 2836 would authorize for seven years and split money with land management agency maintenance. Barragán would set aside O&G royalties for city rec programs.